

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 25, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2012AP2052-CR  
2012AP2053-CR**

**Cir. Ct. Nos. 2011CF164  
2011CF409**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**OSBORNE J. BURKINS, JR.,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Osborne Burkins, Jr., appeals judgments convicting him of operating a vehicle while intoxicated, eleventh and twelfth offenses. He also appeals an order denying his postconviction motion in which he

alleged ineffective assistance of trial counsel. He contends his counsel was ineffective regarding the eleventh offense for failing to cross-examine the arresting officer regarding alleged defects in the field-sobriety tests.<sup>1</sup> We reject that argument and affirm the judgments and order.

¶2 At 10:50 p.m., trooper Randy Gordon stopped Burkins' vehicle when he observed the rear license plate lamp was not working and the driver was not wearing a seatbelt. Gordon observed Burkins' red "glossed over" eyes, slurred speech and the strong smell of intoxicants. He then conducted a field sobriety test consisting of the Horizontal Gaze Nystagmus (HGN) test, a heel-to-toe test and a balance test in which Burkins was asked to stand on one leg. Burkins failed the HGN test in both eyes. He could not keep his balance in the heel-to-toe test, and he failed the balance test by dropping his right foot three times, using his arms for balance and swaying back and forth. A blood sample was taken at 12:05 a.m. and Gordon later placed the kit in a postbox. The State Hygiene Lab reported a blood/alcohol concentration of .183% grams/100ml of blood, more than nine times the legal limit for Burkins as a repeat intoxicated driver.

¶3 At trial, Burkins' attorney pointed out a discrepancy in the police report regarding the date of the offense, and suggested that Gordon might have confused this case with another. He also focused on the State's failure to call the medical technician to testify regarding the blood draw, suggesting uncertainty over whether the sample tested by the hygiene lab was in fact Burkins' blood. Counsel

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<sup>1</sup> Burkins also contends reversal of his conviction for the eleventh offense would constitute a new factor justifying sentence modification for the twelfth offense. Because we affirm the conviction for the eleventh offense, there is no basis for challenging the sentence for the twelfth offense.

also noted the hygiene lab did not test the blood for eleven days, again suggesting that the delay would affect the result. Counsel pointed out that Gordon did not observe any erratic driving and only stopped his vehicle because of an equipment violation.

¶4 In his postconviction motion, Burkins faulted his trial counsel for failing to challenge the results of the field sobriety test administered by Gordon. Burkins did not testify at the postconviction hearing, but his attorney argued trial counsel should have asked about the effect oncoming car lights would have on the HGN test. Gordon testified that he turned off his squad car lights and there was little traffic on the street at the time he administered the HGN test.

¶5 Burkins' counsel also argued that Burkins' back problems affected his ability to perform the other tests. However, the trial court rejected that argument, noting that Burkins was a roofer and had been working as a roofer that very day. Burkins' trial counsel testified that Burkins never told him of any back problems or any other problems that prevented him from performing the field sobriety tests.

¶6 Burkins' postconviction counsel also suggested the heel-to-toe test was improperly administered because there was no line for Burkins to follow and Gordon did not have Burkins perform a "hop test." The trial court found the heel-to-toe test was usually performed using an imaginary line and failure to administer the hop test did not invalidate the one-leg-standing test. The court accepted Burkins' trial counsel's explanation that he strategically chose not to put on weak or equivocal evidence regarding the field sobriety tests because he did not want to call further attention to Burkins' dismal performance on the tests and instead

hoped to have the jury focus on alleged defects in the blood test and the possibility that it was not Burkins' blood that was tested.

¶7 To establish ineffective assistance of counsel, Burkins must show deficient performance and prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and Burkins must overcome a presumption that the challenged action might be considered a sound trial strategy. *See id.* at 689. Counsel's strategic choices made after thorough investigation of the law and facts are virtually unchallengeable on appeal. *Id.* at 690. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. *Id.* at 691. To establish prejudice, Burkins must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one that undermines our confidence in the outcome. *Id.*

¶8 Burkins established neither deficient performance nor prejudice from his counsel's decision not to challenge the field sobriety tests. Trial counsel's uncontradicted testimony established that the strategy he implemented was Burkins' own strategy. Because Gordon turned off his squad car lights and there was little traffic on the road at the time Gordon administered the HGN test, counsel reasonably chose not to attempt to persuade the jury that oncoming traffic lights interfered with the test results. Likewise, because Burkins never told Gordon that he had any back problems that interfered with his ability to take the tests, never told his attorney before or during the trial of any back problems, and Burkins' job would not suggest such debilitating injury as to interfere with a field

sobriety test, counsel reasonably chose not to call the jury's attention to Burkins' abysmal performance by challenging the tests.

¶9 Burkins also failed to establish prejudice from his counsel's choice of defenses because overwhelming evidence established Burkins' guilt. In light of Gordon's observations and the results of the blood tests, along with Gordon's postconviction testimony explaining the circumstances of the field sobriety tests, any defect in counsel's failure to challenge the field sobriety tests does not undermine our confidence in the outcome.

*By the Court.*—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

